IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 433 of 2001
WITH
SPECIAL CRIMINAL APPLICATIONS No 560 & 579 of 2001
WITH
CRIMINAL MISC. APPLICATION NO.8391 OF 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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THE ARVIND MILLS LIMITED

Versus

STATE OF GUJARAT

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Appearance:

1. Special Criminal Application No. 433 of 2001
MR S.B. VAKIL, SR. ADVOCATE FOR M/S THAKKAR ASSOC. for the Petitioners.
MR AD OZA, PP, for Respondent No. 1
MR SHANTI BHUSHAN, SR. ADVOCATE WITH
MR ND NANAVATI, SR. ADVOCATE WITH
MR S.V. RAJU, ADVOCATE for Respondent No. 2
MR MJ THAKORE, SR. ADVOCATE WITH MR SANDEEP SINGHI FOR M/S SINGHI & CO for Respondent No. 3-9

2. Special Criminal Application No. 560 of 2001
MR HN SALVE, SOLICITOR GENERAL OF INDIA WITH
MR MJ THAKORE, SR. ADVOCATE WITH MR. SANDEEP SINGHI FOR M/S SINGHI & CO for the Petitioner.
MR AD OZA, PP, for Respondent No. 1
MR SV RAJU, ADVOCATE, for respondent No.2.
MR SN SOPARKAR, SR. ADVOCATE WITH MR. P.K. JANI,

ADVOCATE, for respondents No.3 to 6.

3. Special Criminal Application No.579 of 2001

MR AMIT DESAI, ADVOCATE, WITH MR. SANDEEP SINGHI,
FOR M/S SINGHI & CO. for the petitioners.
MR AD OZA, PP, for respondent No.1.
MR SV RAJU, ADVOCATE, for respondent No.2
MR RJ OZA, ADVOCATE, for respondents No.3 to 6
MR VYAPAK N DESAI, ADVOCATE, for respondent No.7.

4. Criminal Misc. Application No.8391 of 2001.

MR. SHANTI BHUSHAN, SR. ADVOCATE WITH
MR. ND NANAVATI, SR. ADVOCATE, WITH
MR. SV RAJU, ADVOCATE, for the applicant.
MR. SB VAKIL, SR. ADVOCATE, for M/S THAKKAR
ASSOCIATES, for opponents No.1 to 4.
MR MJ THAKORE, SR. ADVOCATE, WITH MR. SANDEEP
SINGHI FOR M/S SINGHI & CO. for respondents
NO.5 TO 11.
MR. AD OZA, PP, for respondent No.12.

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CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 07/05/2002

CAV JUDGEMENT

1. Rule. Mr. A.D. Oza, learned Additional Public Prosecutor, waives service on bahalf of the State in all the matters. Mr. S.V. Raju waives service on behalf of the respondent-original complainant in Special Criminal Applications No.433, 560 and 570 of 2001. Mr. Sandeep Singhi for M/s Singhi & Co. waives service on behalf of respondents No.3 to 9 in Special Criminal Application No.433 of 2001. Mr. P.K. Jani waives service on behalf of respondents No.3 to 6. in Special Criminal Application No.560 of 2001. Mr. R.J. Oza waives service on behalf of respondents No.3 to 6 and Mr. Vyapak N. Desai waives service on behalf of respondent No.7 in Special Criminal Application No.579 of 2001.

2. A private complaint came to be filed in the Court of learned Metropolitan Magistrate, at Ahmedabad by Commerzbank A.G., a banking company incorporated under laws of Germany, through Mr. A. Sekar on 6.6.2002 against ICICI Limited and Arvind Mills Limited along with their respective directors and officers for offences punishable under Sections 409, 421 and 424 read with Section 120-B of Indian Penal Code. Learned Metropolitan Magistrate, Court No.18, Ahmedabad, passed an order on 7.6.2001, directing registration of complaint and issuance of summons for offences punishable under Sections 409, 421 and 424 read with section 120-B of I.P.C. against the accused persons. The case was registered as Criminal Case No.964 of 2001 Aggrieved by

the said lodging of complaint and the order passed thereunder, the accused persons have preferred these petitions under Article 227 of the Constitution of India.

3. As the petitions arise out of the same complaint and the order of the learned Metropolitan Magistrate and as common questions are involved, they have been heard together and are disposed of by this common judgment.

4. As seen earlier, respondent-Commerzbank lodged a criminal complaint against the petitioners for offences punishable under Sections 409, 421 and 424 read with Section 120-B of I.P.C. and the learned Magistrate directed registration of the complaint and issuance of summons for the said offences against the accused persons (petitioners herein). The original accused persons (petitioners herein) have sought quashment of the complaint and the order. In order that the contentions of the parties can be properly appreciated, certain facts would be pertinent to be noted.

5. Arvind Mills Limited ("AML" for short) is a limited company incorporated under the provisions of the Companies Act, 1956 and is mainly engaged in textiles and garment business. Around 1996-97, AML undertook expansion and diversification programme for the manufacture of different varieties of fabrics, garments, etc. In order to meet with the project cost, after due negotiations, an amount of 75 million US dollars was agreed to be lent to AML by a syndicate of about 13 foreign lenders, of which Commerzbank was one. The contribution of Commerzbank was to the tune of 9.6 million US dollars. In order that the agreement is acted upon, a document called "Facility Agreement" was entered into by the Syndicate (the Lenders), Facility Agent (Agent of the lenders)-the Bank of Nova Scotia Asia Limited and AML on November 15, 1996. Thereafter, another document called "Security Agent and Trust Agreement" ("SAT Agreement" for short) was executed on the 31st March, 1997 b AML, ICICI Limited, the Bank of Nova Scotia Asia Limited as the facility agent and the lenders. On basis of these documents, agreed amount of Rs.75 million US dollars came to be advanced to AML. By virtue of these documents, the first pari passu legal charge over immovable properties and the first pari passu charge by way of hypothecation over movable assets was created in favour of the lenders. By virtue of the SAT Agreement, ICICI Limited agreed to act as security agent and trustees for the facility agent (Bank of Nova Scotia Asia Ltd.) and the lenders in respect of the assets to be secured by the AML under the security documents.

6. After the money was advanced, in December 1999. AML entered into a Sale and Lease Back transaction with ICICI in respect of the assets of the Santej plant of AML. Out of the sale proceeds of the fixed assets, AML repaid certain amount of loan which AML had borrowed from ICICI. By virtue of the Sale and Lease Back transaction, the fixed assets continued to be in possession of AML and it was used by AML for production. Since the property was sold to ICICI and ICICI became the owner thereof, a rent was fixed which was to be paid by AML to ICICI.

7. It appears that AML was facing financial crisis because of number of factors and, therefore, restructuring of debts was contemplated in consultation with the creditors who included the lenders, i.e. the Syndicate, of which the complainant-Commerzbank is a member. A Steering Committee was appointed and, ultimately, the matter went to GBIFR. As the matter stands today, ultimately, a Company Petition came to be preferred before this Court bearing No. 140 of 2001 for sanction of the scheme of restructured debt, which came to be allowed by judgment dated 08.04.2002.

8. In the meantime, the complainant, having come to know about the Sale and Lease Back transaction between AML and ICICI on receipt of Memorandum of Information for Creditors prepared by Jardine Fleming at the instance of AML, felt that, by this transaction, a criminal breach of trust was committed by ICICI and its directors and office bearers in conspiracy with AML and its directors and officers and, therefore, the complaint in question came to be filed by the complainant.

9. The complaint was lodged on 6.6.2001 along with list of witnesses and other relevant documents. Statement of A. Sekar was recorded on that day and the learned Magistrate passed the order on 7.6.2001, which runs as follows :-

> "Complaint to be registered. Issue summons on accused for offence under Section 409m, 421, 424 read with 120-B of I.P.C. on P.F.
>
> Date: 7.6.2001 Sd/-
> Metropolitan Magistrate,
> Court No.18, Ahmedabad."

9.1 Aggrieved by the said complaint and the order, the present petitions are preferred.

9.2 Special Criminal Application No.433 of 2001 is preferred by the Arvind Mills Limited and its directors and officers.

9.3 Special Criminal Application No.560 of 2001 is preferred by ICICI Limited.

9.4 Special Criminal Application No.579 of 2001 is preferred by the directors and the officers of ICICI.

9.5 By these petitions, the petitioners-original accused persons, have prayed for quashment of the proceedings in Criminal Case No.964 of 2001, pending before Court No.18, Metropolitan Magistrate's Court, Ahmedabad and for quashing and setting aside of order of the learned Metropolitan Magistrate passed in Criminal Case No.964 of 2001, directing issuance of summons against the petitioners.

10. When Special Criminal Application No.433 of 2001 was circulated, this Court granted ad-interim relief in terms of paragraph 11(B) staying the further proceedings in the complaint till the returnable date of the notice issued in the matter by order dated 18.6.2001. The operation of that interim relief came to be extended from time to time and, therefore, the original complainant-respondent in these petitions filed Criminal Misc. Application No.8391 of 2001 in Special Criminal Application No.433 of 2001, praying for vacating the ad-interim relief granted in this Special Criminal Application, staying the trial of Criminal Case No.964 of 2001, pending before Court No.18, Metropolitan Magistrate's Court, Ahmedabad.

11. Learned Senior Counsel, Mr. S.B. Vakil, appearing for the petitioner, in order to substantiate the contentions, submitted that the order of the learned Metropolitan Magistrate is a two line order. It does not reflect any application of mind on part of the learned Metropolitan Magistrate. It was submitted that the statement of the complainant itself is not a substitute for the order of the Magistrate. It was submitted that, as per the various decisions of the Supreme Court, the learned Magistrate ought to have passed the order which would reflect application of mind. In support of these contentions, following decisions were cited :-

(1) Punjab National Bank v. Surendra Prasad Sinha, AIR 1992 SC 1815.
(2) Pepsi Foods Ltd. & Anr. v. Special Judicial

Magistrate & Ors, (1998) 5 SCC 749.

(3) Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Ors., 1976(3) SCC 736.

(4) B. Ramesh & Ors. v. State of Gujarat, 1997(2) GLR 1655.

(6) Gujarat State Industrial Co-Op. Bank Ltd. v. Prakashchandra N vora & Ors, 1996(2) GLR 445.

11.1 It was contended that the ingredients of the offences alleged are not indicated in the complaint. Mr. Vakil submitted that to constitute criminal breach of trust, entrustment of property has to be indicated. There is no entrustment of any property by the complainant to AML or its directors. The property belonged to AML which has been sold to ICICI and leased back to AML by ICICI. The property still remains with AML. It was also contended that the sale which has aggrieved the complainant was permissible under the Facility Agreement clause 13.1(l)(ii). Therefore, there is not even breach of the contract between the parties. It was also contended that there is no material to indicate any conspiracy between ICICI and AML and their respective directors. It was contended that the complainant was aware about the transaction much prior to the receipt of the memorandum of information, on basis of which the complainant claims to have come to know about the transaction of Sale and Lease Back Agreement. The complainant, therefore, does not come with clean hands. It is, therefore, a mala fide complaint. In order to support the contention about the mala fide action or the abuse of process of law, it was contended that the complainant was aware about the Sale and Lease Back transaction. Still the complaint is filed after about 15 months. On the contrary, multiple legal actions have been taken by the complainant and, having failed at various fronts, has now resorted to institution of this criminal complaint. It was contended that Special Civil Application No.9188 of 2000 was preferred by the complainant which came to be disposed of on February 22, 2001 without granting any relief to the petitioners (complainant). Likewise, the scheme of restructuring of debt before GBIFR was opposed to by the complainant. At that point of time, the complainant was having no objection to the restructuring scheme proposed. But the complainant sought a prioritative treatment as compared to other creditors which could not have been given by AML. Having failed in the Special Civil Application as well as before GBIFR, the complainant has filed a suit on the 4th January, 2001 in England and now a complaint is preferred with a view to obstruct the Company Petition preferred for sanction of scheme of restructuring of

debt. This indicates that the complainant is out to use the process of law as a leverage to pressurise the petitioners to yield to the demands of the complainant for a prioritative treatment as compared to other creditors of AML. It was submitted that the dispute is basically, essentially and predominantly a dispute of civil nature.

11.2 It was submitted that the complaint does not disclose the offences alleged to have been committed by the petitioners. It was submitted that the sale part of the Sale and Lease Back agreement was permissible to AML since it was aimed at reducing the interest burden on the company and to provide a life support by reducing the burden. The transaction was, therefore, permissible under clause 13.1(l)(ii) of the Facility Agreement. There is nothing in the complaint to indicate that the sale was not in ordinary course of business or that it was for a price less than the market price. It was submitted that there is no entrustment of property. It was, therefore, urged that the petition by the AML be allowed.

12. Learned Senior Counsel Mr. Salve, appearing for the petitioners in Special Criminal Application No. 560 of 2001, submitted that it is a case of sheer abuse of process of law. The dispute is of civil nature. The conduct of the complainant indicates that attempts were made to make good their civil right and, having failed, this complaint is lodged with an ultimate goal of pressurising the petitioners for yielding to the demand of the complainant in respect of the civil dispute. It was submitted that the complaint does not disclose the ingredients of the offences charged. It was submitted that, while exercising the powers for quashing, the Court has to apply two tests. The first is that whether the criminal recourse is a trickly disguised recourse of civil remedy and the second is whether the complaint makes out a criminal offence. It was submitted by Mr. Salve that even if the admitted facts are considered, it is a pure abuse of process of law and lacks any bona fide. It was contended that the complaint nowhere discloses the dishonest intention on part of the petitioners and if that is lacking, the offences alleged cannot be said to have been committed. It was submitted that a bona fide transaction cannot be given a garb of a dishonest action to constitute criminal breach of trust. It was submitted that the complaint must disclose dishonesty or lack of bona fides. Bona fide transaction claimed by the petitioner is not a defence but lack of bona fide or dishonest intention is an essential

ingredient for constituting the offence alleged in the complaint and must be disclosed in the complaint, which is not done and the complaint, therefore, deserves to be quashed. It was submitted by Mr. Salve that there is total absence of mens rea in the alleged transactions of sale and lease back. The attempt was to save the project. Ninety three per cent of the creditors agreed to the scheme of restructure of debt. The complainant wanted a priority over other creditors and, hence, the complaint. The transaction is not a clandestine transaction. It has been entered into after obtaining appropriate legal opinion and is disclosed in the Information Memorandum for Creditors prepared by Jardine Fleming Singapore Securities Pte. Ltd., the financial advisor to AML. The complaint is based on the said information memorandum which does not disclose any mens rea. Bona fides of AML is not doubted by Jardine Fleming. It was contended that the sale part of the Sale and Lease Back transaction was for full market value. It was contended that the complaint is drafted with bald assertions for satisfying the requirement of ingredients of the offences, but factually that part is not made out and bald and misleading statement about the wrongful loss itself would not constitute an offence. It was contended that all these aspects ought to have been considered by the learned Magistrate before passing the impugned order. The complainant has tactfully referred to the London suit in a very casual manner in the complaint. The learned Magistrate ought to have called for the copy of the plaint before passing the order. If that was done, the contradictory versions emerging from the complaint and the plaint would have been noticed and the order may not have been passed. It was submitted by Mr. Salve that by the Facility Agreement and the SAT Agreement, AML was required to maintain an asset cover of not below 133.33% and at no point of time. This condition is not breached. The right of the complainant is, therefore, not affected. Mr. Salve, relying on certain decisions, submitted that this is a fit case in which the Court may exercise its powers and quash the complaint. He submitted that it is a case of abuse of process of law.

13. Mr. Desai, learned counsel for the directors of ICICI, submitted that it is true that the Court has to be slow in quashing the complaint in exercise of powers under Section 482 of the Code of Criminal Procedure. But placing reliance on certain decisions, Mr. Desai submitted that the Court must exercise these powers if the complaint does not make out the ingredients of the offences alleged, if mens rea is not found and if it is found that the complaint is an abuse of process of law.

He submitted that the complainant comes with different versions at different levels in different proceedings. He submitted that the case of the complainant in the suit in the English Court is different than the one in the complaint and the case emerging from the affidavit-in-reply to the petition is different that the case emerging from the complaint. This reflects that the complainant is either not sure about its case or that it does not approach the Court with clean hands. It was subsmitted by Mr. Desai that all assets are not sold and leased back. The asset cover of 133.33% assured under the Facility/SAT Agreement has been maintained. It was submitted that the complainant has annexed with the complaint the Information of Memorandum prepared by Jardine Fleming, but only in part. The whole report is not produced. If the whole report is read, it in dicates that the transaction is purely commercial transaction and there is no mens rea. Mr. Desai also subsmitted that the transaction was permitted under clause 13.1(l) of the Facility Agreement. Any commercial institution would try to reduce its financial burden and would try for its survival. This transaction was aimed at that as can be seen from the report of Jardine Fleming and, therefore, the complaint is illfounded and may be quashed.

14. Mr. Soparkar, learned Sr. Advocate appearing for the petitioner in Special Criminal Application No. submitted that the very premise of complaint is factually incorrect and contraty to the proceedings in the London Court. It was contended that under the Sale and Lease Back transaction, what is transferred is the right of AML, i.e. the mortgager's right of redemption and not other right of the mortgagee. It was contended that cluase 13.1(l) of the Facility Agreement protects the accused persons and, therefore, the properties are transferred to ICICI free from encumbrance and in a valid and legal manner. Mr. Soparkar submitted that even if that contention is not correct, the effect of transfer by AML to ICICI under the Sale and Lease Back Agreement would be that ICICI shall hold the same subject to the charge and, in that event also, the complainant's interest is protected and, therefore, the whole allegation about the breach of trust is without any basis.

15. Mr. Thakore, learned Senior Advocate, has raised a large number of question on the provisions of Transfer of Property Act, regarding mortgage, equity of redemptions, right of mortgagee and right of mortgager and contended that in either case, the interest of the complainant-bank is protected. If sale was not permitted

under clause 13.1(l) of the Facility Agreement, then also what is sold is the mortgager's right to redeem and even if that is not so what is purchased by ICICI would be subject to the charge of the complainant as ICICI who has purchased the same was fully aware about the right of the complainant over the property. Mr. Thakore also submitted that, if the documents are properly perused and interpreted, it is a case of floating charge which is created by the Facility agreement and by the SAT Agreement. Mr. Thakore argued on various aspects touching fixed and floating charge and effets thereof.

16. Learned Counsel, Mr. Shanti Bhushan, appearing with Mr. Raju, learned advocate for the original complainant-respondent herein, submittd that th contentions raised by the petitioners are all illfounded. He relied on several decisions to indicate that the scope for interference in such a quashing petition is limited as per the settled proposition of law. He submitted that the complaint cannot be thrown off at the initial state if the complaint reveals commission of offence prima facie. If on plain reading the complaint makes out the ingredients of offence alleged, the Court may not interfere and quash the complaint.

16.1 Mr. Shanti Bhushan submitted that, in the instant case, a plain reading of the complaint would indicate that the ingredients of the offences are made out in the complaint and are supported by the documentary evidence annexed to the complaint. He has drawn attention to paragraph 5.1, 5.2, 5.3, 6, 7, 9, 10, 12, 13, 14 and 28 of the complaint. He has also drawn attention of this Court to paragraph 2.4(a) and (b) of the Facility Agreement and Article I (paragraphs 1.01 & 1.03) and Article IV [paragraph 4.01(j)] of the SAT Agreement to indicate that there is a trust created and there is an entrustment. Mr. Shanti Bhushan has drawn attention of this Court to clause 13.1(l) of the Facility Agreement and paragraph 2 of the Hypothecation Agreement. He submitted, therefore, that the complaint does disclose an offence prima facie.

16.2 As regards the order impugned, Mr. Shanti Bhushan submitted that the order, though short, it is hand written and it is written just below the statement of the complainant and, therefore, it cannot be said that the learned Magistrate has not applied his mind. He has relied on certain decisions to indicate that in such eventuality, it is not always necessary that the order must be reasoned one.

16.3 Mr. Shanti Bhushan submitted that there may be commercial transactions and breach of which may give rise to criminal offence and civil as well as criminal proceedings may be initiated simultaneously. Mr. Shanti Bhushan submitted that, merely because a suit is preferred in the London Court, it will not be a ground for quashing the complaint. Mr. Shanti Bhushan submitted that a petition under Section 391 of the Companies Act cannot have any impact on prosecution. It will have only civil impact.

16.4 Mr. Shanti Bhushan submitted that so far as other contentions are concerned, they are in the nature of defence raised by the accused and they cannot be examined at this stage. He submitted that where an offence is made out, mala fide is not material. Motive also will not be material. He has placed reliance on certain decisions in this regard. Likewise, he submitted that delay in lodging a complaint cannot be a valid ground for quashment of the complaint in a case where law does not prescribe any period of limitation. It was submitted that so far as the defect in the power of attorney as highlighted by the petitioners is concerned, that cannot be a ground for quashing the complaint. The author of the power of attorney may ratify the act at a later point of time.

16.5 Commenting on the contention that the Sale and Lease Back transaction was a transaction in normal course of business, Mr. Shanti Bhushan submitted that the term normal business would include manufacture and sale of finished goods and not the machinery, tools, etc. It was submitted that, even if it is considered as a permissible transaction, the sale was permissible only on market value and not at book value. Mr. Shanti Bhushan submitted that the ingredients, namely, the entrustment, dishonesty and misappropriation are made out by the fact that the SAT Agreement indicates entrustment. Wrongful loss is caused to the complainant and wrongful gain is made by ICICI by entering into the Sale and Lease Back Agreement which indicates dishonest intention and so far as misappropriation is cocnerned, the sale proceeds received by AML from ICICI were not given to the complainant but were paid to ICICI for clearing its past debts prematuredly.

16.6 Mr. Shanti Bhushan submitted that hypothecation is not floating charge, but a full and complete charge. He has relied on certain decisions to support his contention.

16.7 As regards the contention that there is no material against individual accused persons, he has drawn attention of this Court to paragraph 15.1, 15.2, 16, 17, 17.1, 17.2, 17.3, 18, 19, 20, 22, 23, 24 and 25 of the complaint.

16.8. Mr. Shanti Bhushan submitted that there is no question of abuse of process of Court. Simply because the complainant pursued civil remedy first or simply because attempt was made by the complainant to negotiate clearing their dues, it cannot be said that it is an ill-intended complaint. After all, complainant is a commercial institution interested in its activities rather than going for litigations. And such attempts would only indicate fairness on part of the complainant.

17. Mr. N.D. Nanavati, learned Senior Advocate, defending the respondent-complainant, submitted that what is in question is not the Sale and Lease Back transaction, it is the dishonesty on part of the accused persons that is in question. He submitted that the case of the petitioners that it was a bona fide transaction entered into under a bona fide belief and that such a transaction is permissible is only a defence. As such intention cannot be inferred in such a proceeding. He submitted that intention is a question of fact and it can be judged only at the time of trial on basis of the prosecution case, the evidence and the defence. Mr. Nanavati also submitted that the contention that the transaction was in ordinary course of business is again a defence raised by the accused persons and cannot be looked into at this stage.

18. Mr. Raju, learned Advocate on behalf of the complainant, submitted that the contention that the Sale and Lease Back transaction was entered into for sale at a price higher than the market value is not correct. It is not more than the book value either. He has drawn attention to clause 1.03 and 4.03 of the SAT Agreement and submitted that the sale proceeds out of the Sale and Lease Back Agreement were used in violation of these caluses. He submitted that clause 8.01 of the SAT Agreement creates a beneficial interest. He also submitted that clause 13.1(l) of the Facility Agreement does not refer to sale proceeds and, therefore, the contentions raised are not proper. He submitted that the petitions may be dismissed.

19. Learned Public Prosecutor, Mr. Oza, appearing for the State submitted that the dispute is mainly between the parties and appropriate orders may be passed.

He has, however, drawn attention of this Court to the fact that the Court, though empowered under law to quash the complaint and/or order issuing summons, should exercise this power sparingly. It was submitted that, as per the settled legal propositions, complaint cannot be quashed if an offence is made out on a plain reading of the complaint. It is not permissible for the Court to enter into a detailed examination and evaluation of the evidence and case of rival sides. It was, therefore, urged that appropriate orders may be passed.

20. The following conentions are thus canvassed on behalf of the petitioners-original accused:-

(1) The order of the learned Metropolitan Magistrate is non-speaking and does not reflect any application of mind.

(2) The dispute between the parties is of purely a civil nature and in order to exert pressure for realisation of a civil right, a criminal colour is sought to be given to bona fide and legal transactions of Sale and Lease Back by the complainant.

(3) The complaint does not disclose the offences with which the accused persons are charged and, therefore, summons could not have been ordered.

(4) The complainant, having failed at other fronts, has abused the process of law by preferring this complaint.

(5) The complaint is preferred at a belated stage.

(6) The complaint is preferred by the Commerzbank through A. Sekar, who claims to be power of attorney holder. If the power of attorney is perused, it authorises him to lodge a complaint only against the directors of AML and ICICI. Therefore, the complainant's complaint is without authority.

(7) Sale and Lease Back Agreement is permissible under the Facility Agreement and SAT Agreement. Even if it is taken that it is not permissible, it sells only the right of redemption which still continued to be vested in AML and even if it is not so, ICICI being a purchaser with knowledge about the right of complainant, it has purchased with that right. No loss is, therefore, caused

to the complainant.

(8) The complaint, even if taken at face value, indicates only a breach of contract, namely, the Facility Agreement and the SAT Agreement. A bona fide breach of contract would not result into a criminal breach of trust, although it is contended that the Sale and Lease Back transaction was not barred but was permissible under the agreement.

21. Contentions raised on behalf of the petitioners-original accused are countered by the respondent-original complainant as under :-

(1) A speaking order while issuing summons is not required to be passed by the Court. The order is hand written one and, therefore, would indicate application of mind.

(2) The dispute may be of civil nature, but there are commercial transactions which also entail criminal action and such commercial transactions may result into criminal offences. In such eventuality, criminal proceedings can be instituted along with civil litigation and they both can be continued.

(3) The contentions raised by the petitioners regarding the transaction being bona fide, dispute being of civil nature, etc. are defences raised by the accused. They can be considered at the time of the trial and cannot be considered or accepted at this stage.

(4) It is contended that mala fide action becomes insignificant where an offence is made out in the complaint.

(5) Delay in lodging of complaint is a defence which can be considered at the trial and complaint cannot be thrown off on this ground. Where the law does not prescribe any period of limitation, the complaint can be lodged at any point of time.

(6) Defect in power of attorney cannot be of any virtue to the petitioners as crimil law can be set into motition by any individual and question of locus standi or defect in the authorisation of the complainant is not a sufficient ground to quash the complaint.

(7) Bona fide action claimed by the petitioners is only a defence which can be considered at the time of the trial. To decide the question whether the action was bona fide or otherwise would be a question of fact and evidence will have to be adduced in support thereof. Therefore, it cannot be a ground for quashing the complaint.

22. Having regard to the contentions raised before this Court, there are certain facts emerging undisputed:-

(1) Loan to the tune of 75 million US dollars was obtained by AML from the Syndicate of which Commerzbank is a member.

(2) (a) Facility Agreement, (b) SAT Agreement and (c) Hypothecation Agreement were entered into by the Lenders (the Syndicate comprising of Commerzbank and others), Security Agent and Trustee (ICICI), Facility Agent (The Bank of Nova Scotia) and the Borrower (AML).

(3) Sale and Lease Back transactions were entered into between AML and ICICI in respect of the property under the charge of the complainant (nature of charge though in dispute).

(4) Sale and Lease Back transactions were entered into without prior written consent of either the lender or the facility agent.

(5) A part of the sale proceeds through Sale and Lease Back agreement received by AML were deposited with ICICI towards repayment of prior loan from ICICI. The rest was retained by AML. Not amount from sale proceeds was paid to the Lenders.

(6) By virtue of Sale and Lease Back transactions, the ownership of the properties in question is transferred from AML to ICICI.

(7) ICICI and AML are aware of and party to the transactions.

(8) The complaint charges ICICI of having committed criminal breach of trust and AML with conspiracy in respect of the Sale and Lease Back

transactions.

23. This Court, therefore, is required to examine the question whether in the above fact situation, this Court should quash the complaint and/or order passed by the learned Metropolitan Magistrate for issuance of summons against the petitioners. These are petitions under Article 227 of the Constitution praying for quashment of the complaint and/or the order for issuance of summons. As is settled by various pronouncements, nomenclature of the petitioner or the provisions stated in the petition under which the petition is preferred need not be construed very strictly. In substance, these petitions are required to be examined as petitions for quashment of the complaint [Pepsi Foods Ltd. & Another v. Special Judicial Magistrate & Ors., (1998) 5 SCC 749]

24. The scope of such petitions will have, therefore, to be examined. The Apex Court in the case of State of Haryana & Ors. v. Bhajan Lal & Ors., 1992 Supp (1) SCC 335 examined the question as to whether criminal proceedings can be quashed by the High Court in exercise of powers under Section 482 of the Code of Criminal Procedure or Article 226 of the Constitution and stated several circumstances by way of illustration wherein extraordinary power under Article 226 or the inherent power under Section 482 of the Code can be exercised by the High Court either to prevent abuse of process of any Court or otherwise to secure the ends of justice. The Apex Court gave the following illustrations :-

(1) Where the allegations made in the first information report or the complait, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with lmala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

24.1 The Apex Court in M. Krishnan v. Vijay Singh & Another, (2001) 8 SCC 645 observed thus:

"9. Right from the case of R.P. Kapur v. State of Punjab this Court has held that revisional or inherent powers for quashing the proceedings at the initial stage can be exercised only where the allegations made in the complaint or the first information report, even if taken at their face value and accepted in their entirety, do not prima facie disclose the commission of an offence or where the uncontroverted allegations made in the FIR or complaint and the evidence relied in support of the same do not disclose the commission of any offence against the accused, or the allegatiosn are so absurd and inherently improper that on the basis of which no prudent person could have reached a just conclusion that there were sufficient grounds in proceeding against the accused or where there is an express legal bar engrafted in any provisions of the Code

or any other statute to the institution and continuance of the criminal proceedings or where a criminal proceeding is manifestly actuated with mala fide and has been initiated maliciously with the ulterior motive for wrecking vengeance on the accused and with a view to spite him due to private and personal grudge."

24.2 In Kamaladevi Agarwal v. State of West Bengal & Ors., JT 2001 (9) SC 162, the Apex Court observed that inherent powers of quashing the proceedings at the initial stage should be exercised sparingly and only where the allegations made in the complaint or the FIR, even if taken at the face value and accepted entirely, do not prima facie disclose the commission of the offence. Disputed and controversial facts cannot be made the basis for the exercise of jurisdiction.

24.3 In Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd. and Ors., JT 2000(2) SC 426 = (2000) 3 SCC 269, the Apex Court observed that it is a settled principle of law that for exercising powers under Section 482 of the Code of Criminal Procedure , the complaint in its entirety shall have to be examined on the basis of the allegations in the complaint and the High Court, at that stage, has no authority or jurisdiction to go into the matter or examine its correctness. Whatever appears on the face of the complaint shall be taken into consideration without any critical examination of thesame but the offence ought to appear ex-facie on the complaint.

24.4 In State of Bihar v. Rajendra Agrawalla, (1996) 8 SCC 164, the Apex Court observed thus:

"5. It has been held by this Court in several cases that the inherent power of the court under Section 482 of the Code of Criminal Procedure should be very sparingly and cautiously used only when the Court comes to the conclusion that there would be manifest injustice or there would be abuse of the process of the court, if such power is not exercised. So far as the order of cognizance by a Magistrate is concerned, the inherent powers can be exercised when the allegations in the first information report or the complaint together with other materials collected during investigation taken at their face value do not constitute the offence alleged.

At that stage, it is not open for the court either to sift the evidence or appreciate the evidence and come to the conclusion that no prima facie case is made out."

24.5 In M.N. Damani v. S.K. Sinha & Ors., (2001) 5 SCC 156, the Apex Court ruled that for deciding whether criminal proceedings should be allowed to be continued or the same should be quashed, two aspects are to be satisfied: (1) whether the uncontroverted allegations, as made in the complaint, prima facie establish the offence, and (2) whether it is expedient and in the interest of justice to permit a prosecution to continue.

24.6 In Central Bureau of Investigation v. Dunkens Agro Industries Limited, (1996) 5 SC 591, the Court gave a finding that criminal action is also available along with civil suit if the act constitute both a civil wrong and a criminal wrong.

24.7 In Kamaladevi Agarwal v. State of West Bengal & Ors., JT 2001 (9) SC 162, the Apex Court observed in paragraph 15 that the nature and scope of civil and criminal proceedings and the standard proof required in both the matters are different and distinct.

24.8 In Maratt Rubber Ltd. v. J.K. Marattukalam, (2000) 9 SCC 547, the Apex Court observed thus :

"....It has been repeatedly held by this Court that power of High Court under Section 482 CrPC should be sparingly and cautiously exercised and only when the Court, on consideration, comes to a conclusion that otherwise it would be a case of abuse of the process of court or that there will be a gross miscarriage of justice. In a case instituted on complaint, the High Court was possibly not entitled to look to the several documents purported to have been filed by the accused in civil proceedings and rely on some orders/observations made thereunder. A bare scrutiny of the impugned judgment would indicate that the High Court has though, as if it is trying the case, and then after weighing the materials it has come to a conclusion one way or the other. This is certainly in excess of the jurisdiction conferred on the High Court under Section 482 of the Code of Criminal Procedure."

24.9 In Chand Dhawan (Smt) v. Jawahar Lal and Others, (1992) 3 SCC 317, the Apex Court ruled that truth or otherwise of the allegations in the complaint is a matter of proof. When the materials relied on by the respondent require to be proved, no inference can be drawn on the basis of those materials to conclude that the complaint is false. The Apex Court also observed that the High Court can exercise its inherent jurisdiction of quashing a criminal proceeding only when the allegations made in the complaint do not constitute an offence or that the exercise of the power is necessary either to prevent the abuse of the process of the court or otherwise to secure the ends of justice.

24.10 In Lalmuni Devi (Smt) v. State of Bihar & Ors., (2001) 2 SCC 17, the Apex Court observed that the order quashing the complaint on the ground that it spelled out civil wrong and continuance of criminal prosecution would be an abuse of process of the court cannot be sustained. The Court observed that facts may given rise to a civil claim and also amount to an offence. Merely because a civil claim is maintainable does not mean that the criminal complaint cannot be maintained.

24.11 In Medchl Chemicals & Pharma (P) Ltd. (supra), the Apex Court observed that mere fact that the offence was committed during the course of commercial transaction by itself is not sufficient to quash the complaint.

25. From the above settled legal position, it is clear that the High Court has to exercise its powers while quashing a complaint very sparingly. While exercising the powers, the Court has to examine the complaint and the supporting documents to ascertain whether the offences alleged in the complaint are made out or not. While examining the question of quashment of complaint, the Court is not supposed to sift and evaluate the evidence or to enter into debated questions. The Court has not to examine the truth or otherwise of the allegations made in the complaint since it is a matter of proof. If the material relied on by the complainant requires to be proved, no inference can be drawn on basis of the material to conclude that the complaint is false. The powers of quashing a criminal proceeding can be exercised only when the allegations made in the complaint do not constitute the offence or that the exercise of power is necessary either to prevent the abuse of process of Court or otherwise to secure the ends of justice. Existence of civil dispute per se cannot be a ground for quashing of complaint.

25.1 If these principles are applied to the present case, existence of suit in London by itself cannot be a ground for quashing the complaint. Even the petitioners seek quashment of the complaint mainly on the ground that the complaint is filed to bring pressure on the petitioners to yield to the demand of the complainant in respect of the loan advanced by the complainant and, therefore, it is a mala fide action and that it is an abuse of process of Court. Learned counsel for the petitioners also contended that quashment of complaint is not sought only on the ground of pendency of civil suit or that the dispute of civil nature, but it is sought on the ground of abuse of process of Court and the action being mala fide.

26. The petitioners have raised several contentions, as stated above. The first contention that is raised by the petitioners is that the order passed by the learned Magistrate does not reflect application of mind and is a non-speaking order. It was also contended that the complaint itself is a lengthy one. Along with the complaint, voluminous documents have been produced and the learned Magistrate could not have passed the order after going through the papers and applying mind thereto. In support of the contentions, reliance was placed on the decision in case of Nagawwa v. Veeranna Shivlingappa Konjalgi reported in (1976) 3 SCC 736 and the decision in case of Punjab National Bank v. Surendra Prasad Sinha, AIR 1992 SC 1815. In Punjab National Bank's case, the Apex Court held that relevant facts and circumstances should be considered before issuing process. Where a complaint is filed as a vendetta to harass persons and process is issued mechanically, the complaint deserves to be quashed. The Apex Court observed that where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based on no evidence or on materilas which are irrelevant and inadmissible, the order of the Magistrate issuing process may be quashed. The petitioners also relied on the decision in the case of Pepsi Foods Limited & Another v. Special Judicial Magistrate & Ors., (1998) 5 SCC 749 in support of the contention that the order issuing process must show that the Magistrate applied his mind to the facts of the case and law applicable thereto.

26.1 Against this, the respondents have placed reliance on the decision in U.P. Pollution Control Board v. Mohan Meakins Ltd. & Ors., (2000) 3 SCC 745. In that case, the Apex Court observed that there is no legal requirement for the Trial court to pass a detailed order

while issuing process whether summons or warrant under Section 204. The Apex Court also relied on the decision in the case of Kanti Bhadra Shah v. State of West Bengal, (2000) 1 SCC 722, wherein similar observations were made. In that decision, it was observed that it is quite unnecessary to write detailed orders at stages such as issuing process, remanding accused to custody, framing of charge, passing over to next stages in the trial, etc.

26.2 What emerges from the above is that the Apex Court, in decisions rendered later in point of time, i.e. subsequent to the Pepsi Foods' case, has specifically ruled that there is no requirement for a speaking order while issuing process. Apart from this, it would be relevant to note that the complaint was lodged on 6.6.2001 and the statement of the complainant was also recorded on that day. However, the order is passed on 7.6.2001. The order is passed by the learned Magistrate in his own hands, just below the statement. This indicates that the learned Magistrate did not mechanically pass the order, but took time for considering the case of the complainant before taking cognizance and then only the order is passed. It is not as if the complaint is presented, statement recorded and order passed immediately. Although not a speaking one, it cannot be said that the order is without application of mind and, as observed by the Apex Court in Kanti Bhadra Shah's case (supra), when there is no legal requirement that the Trial Court should write an order showing reasons, the order cannot be quashed only on the ground that it is not a speaking order. The order cannot be thrown off board on the ground that it is passed mechanically without application of mind for the reasons stated above, namely, that it is not passed immediately, but has been passed on the next day, in his own hands. The first contention of the petitioners that the order requires to be quashed, therefore, cannot be accepted.

27. The next contention is regarding the dispute being that of a civil nature, which is given a cloak of a criminal offence. In support of this contention, it has been vehemently argued that the transactions between the complainant and the petitioners are commercial in nature, disputes have arisen between the parties and the case of the complainant, even if accepted, would only amount to breach of contract and breach of contract in every case is not a criminal offence or a criminal breach of trust. It was contended that a suit is pending in the English Court involving these very transactions. It was urged that the complainant tried to pursue its civil remedy and if the sequence of developments is seen, it reflects that

the complaint pressed for a prioritative treatment over other creditors of AML. For that purpose, every attempt was made to pressurise AML and having failed in those attempts, present complaint has been lodged. It was shown that when a Steering Committee of the creditors of AML was formed, the complainant refused to participate, but attended the meetings as observer. The scheme for restructuring of debts was sought to be worked out. There also, the complainant opposed. Opposition was registered even before the GBIFR and in a Company Petition before this Court. A suit was filed in London. All these aspects indicate that the dispute is mainly of civil nature, but an attempt is made to give it colour of a criminal offence and, therefore, the complaint may be quashed.

27.1 There cannot be any dispute about the transactions between the parties being of a commercial nature, but that does not necessarily mean that commercial transaction would rule out the possibility of a criminal action on part of any of the parties. As discussed above, in Medchl Chemicals & Pharma (P) Ltd. (supra), the Apex Court ruled that while quashing the complaint, the scope of High Court's jurisdiction is limited. The complaint has to be examined as a whole without going into the merits of the allegations made therein. Mere fact that the offence was committed during the course of a commercial transaction by itself not sufficient to quash the complaint. For quashing the complaint, the Court has to see whether on the fact situation, 'civic profile' outweighs the 'criminal outfit'.

27.2 Pratibha Rani v. Suraj Kumar, (1985) 2 SCC 370 was referred to by the Apex Court and it was observed that both criminal law and civil law remedy can be pursued in diverse situations. In the said decision, it was observed by the Apex Court that both civil and criminal remedy are not mutually exclusive but clearly coextensive and essentially differ in their content and consequence. The object of criminal law is to punish an offender who commits an offence against a person, property or the State for which the accused, on proof of the offence, is deprived of his liberty and in some cases even his life. This does not, however, affect the civil remedies at all for suing the wrongdoer in cases like arson, accidents, etc. It is an anathema to suppose that when a civil remedy is available, a criminal prosecution is completely barred. The two types of actions are quite different in content, scope and import. Therefore, in the opinion of this Court, considering the settled law,

merely because the dispute is of a civil nature, it would not be appropriate to quash the complaint at this stage. It would be relevant to note one factual aspect at this stage that the transactions between the parties involve execution of Facility Agreement and SAT Agreement, by virtue of which the lenders' loaned an amount of 75 million US dollars to AML and ICICI stood as the security agent and trustee of the lenders. By virtue of these documents and the unattested memorandum of hypothecation executed by AML in favour of ICICI acting in capacity of security agent and trustee, certain mortgage, charge and security over certain properties of AML was created and at a later point of time, by virtue of certain sale and lease back agreement entered into between AML and ICICI, some such properties were sold to ICICI and were leased back by ICICI to AML. The effect of these transactions is that the ownership of those properties changed from AML to ICICI. These transactions were entered into between the petitioners without prior information to or consent of the lenders, of which the complainant is a part. Whereas the documents indicate that per clause 13.1(l), for any sale or transfer of property, prior consent of the Agent is necessary unless the sale is in ordinary course of business and for full market consideration. Keeping all these aspects in mind, it is difficult to accept the contention that the dispute is purely of a civil nature and, therefore, the complaint may be quashed to prevent the abuse of process of law.

28. Another contention that is raised by the petitioners for supporting their case for quashment of complaint is that the complaint does not disclose ingredients of any offence alleged in the complaint for which summons has been issued. The offences are not disclosed either jointly or qua each of the accused. It has also been contended that use of the language of the section constituting offence is not sufficient. The allegations have to be substantiated before court issuing process. It was contended that, going through the entire complaint, the offence is not indicated anywhere.

28.1 To consider these contentions, it would be appropriate to consider the offence for which the process is ordered to be issued. The offences are under Sections 409, 421, 424 read with Section 120B of the Indian Penal Code. The main offence is criminal breach of trust as defined under Section 405 of I.P.C. It was contended that there is nothing to indicate entrustment of the property. There is nothing to indicate "dishonesty" as defined in the I.P.C., namely, causing any wrongful loss or wrongful gain. It was also contended that there is

nothing to indicate any misappropriation. The complaint, therefore, is a bundle of bald allegations, as contended by the petitioners. In this regard, it would be appropriate to refer to certain documents. The first one is the SAT Agreement. That document is entered into between AML on the first part, ICICI, the Security Agent and Trustee of the second part, The Bank of Nova Scotia Asia Limited, as Facility Agent of the lenders, of the third part and the banks and financial institutions set out in the schedule to that document collectively called "the lenders" of the fourth part. If the preamble of that document is seen, the following covenants are important to be noted :-

"4. The Facility Agent and the Lenders desire to form the trust created hereby are express trust for the beneficial interest of the Facility Agent and the Lenders and empower the Security Agent and Trustees to accept the assignment by way of security of all assets of the Company, both present and future, subject to the provisions of this Agreement, to execute/enter into/accept suc security documents as also to carry out certain obligations contemplated under/pursuant to such security documents, this Agreement and in accordance with the Pari Passu Arrangement (as hereinafter defined)."

"5. At the request of the Facility agent and the Lenders and the Company, ICICI has agreed to act as Security Agent and Trustees for the Facility Agent and the Lenders in respect of the assets to be secured by the Company under the security documents mentioned above, subject to the terms and conditions contained herein." (emphasis supplied)

It would also be important to refer to paragraph 1.01 of Article I of that document, which runs as under :-

"1.01 APPOINTMENT OF SECURITY AGENT AND TRUSTEES

The Facility Agent and the Lenders hereby appoint and constitute The Industrial Credit And Investment Corporation of India Limited to act as agent and security trustees for the securities created/to be created by the Company in faour of

the Security Agent and Trustees on the Mortgaged Premises, for the purposes and in accordance with the terms and provisions set forth herein.

ICICI hereby agrees to act as Security Agent and Trustees of the Mortgaged premises for the Facility Agent and the Lenders, for the purposes, in accordance with the terms and provisions set forth herein and on the remuneration as mentioned in Section 4.07 hereof"

(emphasis supplied)

28.2 Further, paragraph 1.03 of Articlel I of the said document indicates that ICICI accepted the trusts created thereby and declared that they will hold all estate, right, title and interest in law and in equity in and to the mortgaged premises assigned to them and all monies received by them whether prior to or as a result of enforcement of the security held by them for the benefit of the Facility Agent and the Lenders and apply all such monies received by them out of the mortgaged premises in accordance with Section 4.03 of the said document. The said clause runs as under :

"1.03 DECLARATION OF TRUST BY THE SECURITY AGENT AND TRUSTEES

The Security Agent and Trustees hereby accept the trusts hereby created and declare that they will hold all estate, right, title and interest in law and in equity in and to the Mortgaged Premises assigned to them and all monies received by them whether prior to or as a result of enforcement of the security held by them for the benefit of the Facility Agent and the Lenders and apply all such monies received by them out of the Mortgaged Premises in accordance with Section 4.03 hereof."

Paragraph 4.03 of th said SAT Agreement is also important to be noted, which runs as under :-

"4.03 TRUST OF PROCEEDS OF SALE/REALISATION OUT OF ASSETS MORTGAGED/TO BE MORTGAGED

The Security Agent and Trustees shall hold UPON TRUST the monies (hereinafter

collectively referred to as "the said monies") received by them in respect of the assets mortgaged/to be mortgaged or any part thereof arising out of:-

a) any sale;

b) income;

c) policy or policies of insurance;

d) compensation money in respect of any acquisition and requisition or nationalisation or takeover of the management of the Company;

e) any other realisation whatsoever;

and they shall, in the first place, by and out of the said monies reimburse themselves and pay, retain or discharge all the costs, charges and expenses incurred in or about the entry, appointment of Receiver, or the exercise of the powers and trusts under these presents, including their and the Receiver's remuneration and shall apply the residue of the said monies subject to the rights of the other First Pari Passu Mortgagees:-

FIRSTLY in or towards payment to the Facility agenty and Lenders all fees and expenses due under the Facility Agreement;

SECONDLY towards payment to the Lenders pari passu of all arrears of all interest including compound interest (which shall be deemed to accrue due from day to day) remaining unpaid on the Facility;

THIRDLY in or towards payment to the Lenders pari passu of all principal amounts owing on the Facility held by them and whether the said principal amounts shall or shall not then be due and payable;

FOURTHLY in or towards payment of the surplus (if any) of the said monies to the person or persons entitled thereto.

Provided that, the Security Agent and Trustees may, if so advised by the Facility Agent

on behalf of the Majority Lenders, make payments on account of principal before the whole or part of the interest and other monies due under the Facility Agreement has been paid off, but such alteration in the order of payment herein prescribed shall not prejudice the right of the Lenders to receive the full amount to which they would have been entitled if the ordinary order of payment had been observed or any less amount which sum ultimately realised from the security may be sufficient to pay."

28.3 It is clear from the above clause that ICICI held the monies received by them in respect of the assets mortgaged or to be mortgaged in trust received through either sale or any other realisation whatsoever. The contention that there is no entrustment is negatived by the above clauses. It is not possible to quash the complaint on the ground that entrustment of property is not indicated by the complainant. It is true that, so far as AML is conerned, entrustment is not indicated, but the allegation against AML is that of acting in conspiracy with ICICI for the criminal breach of trust. So far as AML is concerned, the allegation is only that of conspiracy and it has to be noted that there cannot be any direct or tangible evidence so far as conspiracy is concerned. It has to be inferred from the conduct of parties and other circumstances and facts connected with the crime. In this regard, decision in State of M.P. v. S.B. Johari & Others, (200) 2 SCC 57, can be profitably referred to. This can only be possible after the parties are permitted to lead evidence and, therefore, want of ingredient in the form of entrustment cannot be a ground, at this stage, for quashing the complaint against either of the two in light of the above stated facts. It has to be noted that both AML & ICICI were aware about the transactions of Facility Agreement, SAT Agreement and Memorandum of Hypothecation and consequent right of Lenders. Still they have entered into Sale and Lease Back without even informing, leave aside the consent part. The ownership of property in question is changed. What were the circumstances that led to this act are questions of evidence. But to quash a complaint on ground of bona fide action and a simple breach of contract on part of the petitioners is not possible to accept. It is not possible to exonerate AML and its directors by accepting the plea that there is no evidence to indicate conspiracy.

28.4 It was contended that the second ingredient for

criminal breach of trust, namely, dishonesty, is also not made out It as contended that to constitute an offence under Section 405 of I.P.C., namely criminal breach of trust, it must be indicated that the person entrusted with the property or with any dominion over property, dishonestly misappropriated or converted to his own use that property, or dishonestly used or disposed of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged. The term "dishonestly" is defined in Section 24 of I.P.C. to mean that whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, he is said to have done that thing dishonestly. It was vehemently argued that this aspect is not indicated from the complaint and mere use of these words will not constitute such an offence. In this regard, it has to be noted that, as discussed above, a trust was created in favour of ICICI and ICICI accepted the trusts and declared that they will hold all the assets, right, title and interest in law and in equity in the mortgaged premises assigned to them and all monies received by them whether prior to or as a result of enforcement of security held by them for the benefit of the Facility Agent and Lenders and apply all such monies received by them out of the mortgaged premises in accordance with the provision of Section 4.03 of the SAT Agreement. It is also to be noted that the property transferred to ICICI by AML by virtue of the Sale and Lease Back Agreement was part of the properties covered under the Memorandum of Hypothecation. By virtue of the sale part of the Sale and Lease Back Agreement, the ownership of the properties got transferred to ICICI, obviously, not as a Security Agent and Trustee of the Lenders, but independent of it. Since it would not be appropriate to enter into the question of the effect of this transaction on the rights of parties in this petition for quashing of complaint, this Court does not go into that aspect. But, prima facie, it is apparent that the interest of the complainant is adversely affected and ICICI and AML, though aware about the Memorandum of Hypothecation and right of the Lenders created thereby, the Facility Agreement and the SAT Agreement, by entering into this document made gain out of it. Admittedly, the sale proceeds of the property covered under the agreement were appropriated to ICICI for its dues from AML and rest was utilized by AML. No money out of the sale proceeds went to the Lenders.

28.5 Coming to the aspect of misappropriation or conversion or use or disposal of the property, it may be noted that the properties in question were held in trust

by ICICI by virtue of the SAT Agreement and the Memorandum of Hypothecation. That property came to be purchased by ICICI in its individual independent capacity and leased back to AML. ICICI will receive rent for the lease of these properties, which will be utilized by ICICI at its discretion. Keeping all these aspects, in the opinion of this Court, at this stage, it cannot be said that the ingredients of Section 405 of I.P.C. are not made out in the complaint. In the complaint also a specific case is alleged about breach of trust, which is supported by documents.

28.6 It would now be required to be seen whether the complaint alleges these offences or not. A plain reading of paragraphs No.5.1, 5.2, 5.3, 6, 7, 9, 10, 12, 13, 14 and 28 of the complaint would indicate that the offences alleged are constituted. Specific averments as to the conditions set out in the SAT Agreement which have not been followed are indicated. Likewise, reference is made to the Memorandum of Hypothecation and specific case is made out against accused No.8. It is specifically alleged that despite a specific provision in clause (v) of the Hypothecation Deed, the assets have been sold and purchased. A specific allegation about breach of trust has been made in paragraph 9 on material indicated therein. Likewise, paragraph 12 alleges details of dishonest disposal of assets in violation of SAT Agreement. Paragraph 13 indicates entrustment of assets, the acts alleged and the effects thereof are also indicated. Paragraph 14 indicates how the offence is constituted against all the accused persons.

29. As regards the delay in lodging of complaint, it was vehemently argued that the complainant was aware about the sale and lease back transaction much prior to the complainant having received the information memorandum for creditors dated the 29th February, 2000, prepared by Jardine Fleming. It was contended that even if it is accepted that the complainant came to know about the transaction by virtue of that information memorandum, then also, the complaint is late by 15 months and, therefore, the complaint may be quashed. In this regard, it is contended on behalf of the respondent-complainant that where the period of limitation is not prescribed, the complaint can be lodged at any point of time and delay cannot be considered at this stage and it cannot be a ground for quashing.

29.1 Where law does not prescribe a period of limitation, the complaint can be lodged at any point of time. It is true that delay in lodging of complaint will

be relevant factor to be considered by the Court while deciding the complaint on merits. The delay part could as well be explained by the complainant at the time of the trial. In this regard, in the case of Assistant Collector of Customs, Bombay v. L.R. Melwani and Another, AIR 1970 SC 962, the Supreme Court observed that the Court before the complaint is filed cannot throw out the same on the sole ground that there has been delay in filing the complaint. The question of delay in filing the complaint may be a circumstance to be taken into consideration in arriving at the final verdict, but by itself it affords no ground for dismissing the complaint. Thus, the contention regarding delay in lodging the complaint cannot be the basis for quashing the complaint.

30. It is contended by the petitioners that the complaint is lodged by Mr. Sekar, who is the power of attorney holder of the complainant-Commerzbank. The power of attorney authorises him to lodge complaint only against the directors of AML and ICICI. The complaint is against the directors of AML and ICICI as well as against AML and ICICI as institutions. It was, therefore, contended that the complaint is lodged, at least against ICICI and AML, without authority and, therefore, the complaint may be quashed. In this regard, the Apex Court has held that a Magistrate cannot refuse to take cognizance of the offence and to issue process on the sole ground of incompetency in lodging the complaint. Locus standi of a complainant is a concept foreign to criminal jurisprudence save and except where the statute creating an offence provides for eligibility of the complainant, by necessary implication the general principle gets excluded by such statutory provision. General principle that anyone can set or put the criminal law in motion is founded on a policy that an offence, i.e. an act or omission made punishable by any law for the time being in force, is not merely an offence committed in relation to the person who suffers harm but it is also an offence against society. The society for its orderly and peaceful development is interested in the punishment of the offender.

30.1 In case of a complaint by a company filed in the name and on behalf of the company by its employee without authorisation, it was held that the complaint was maintainable and that the authorisation can be rectified even at a subsequent stage. In this regard, reference can be had to the case between Vishwa Mitter of M/s Vijay Bharat Cigarette Stores v. O.P. Poddar and Ors., (1983) 4 SCC 701 and the case of A.R. Antulay v. Ramdas Sriniwas Nayak, (1984) 2 SCC 500. These decisions would

be squarely applicable to the present case and, therefore, the defect, if any, in the power of attorney, on basis of which the complaint is lodged, cannot be a ground for quashment.

31. The next ground on which the quashment of complaint is sought is that the conduct of the complainant, its involvement in multiple proceedings with the petitioners and the late lodging of complaint is nothing but an abuse of process of the Court. It has been highlighted that the complainant was aware about the sale and lease back transaction much prior to 29th February, 2000. However, even after knowing about the sale and lease back transaction through the information memorandum prepared by Jardine Fleming, the complainant did not proceed to lodge the complaint. It entered into correspondence with AML and, thereafter, attended several meetings of the Steering Committee for working out a debt restructuring scheme, but did not participate. The meetings were attended to only as observer. The demand of the Syndicate was that it be paid 70 per cent of its dues as opposed to 45 per cent for the other creditors. A special Civil Application came to be filed before this Court to challenge BRUA notifications on the ground of the disputed transactions of sale and lease back. Even, thereafter, the complainant's representative attended the Steering Committee meetings. A suit came to be filed in the London Court only with an attempt to thwart the restructuring. Even the restructuring process was opposed to before GBIFR by the complainant. All this was done on the basis of the sale and lease back transactions. However, the GBIFR expressed its opinion that the restructuring scheme is in the interest of all concerned. It was, therefore, clear that the scheme would be approved by the High Court and, therefore, the complaint is lodged. It was argued on behalf of the petitioners that the Company Petition was also opposed to by the complainant. It is contended that the attempt on part of the complainant is to force the petitioners into multiple litigations and thereby put them under pressure to yield to the demand of the complainant of a preferential treatment over other creditors. It is contended that a commercial transaction is sought to be converted into an offence. It is contended that the complainant is coming out with new case at every stage. The prayer in the London Suit is quite contrary to the case in the complaint. It is, therefore, contended that the complaint is lodged only with a mala fide intention of pressurising the respondents to the demand of the complainant.

31.1 Against this, it is contended on behalf of the respondent-complainant that the delay in lodging of complaint cannot be a factor to indicate that it is an abuse of process of Court. It is also contended that where an offence is made out mala fide of the complainant is not relevant. It is also contended that the sequence of events only indicates that the complainant was not interested in taking criminal action if its monies were made good by the respondents and, therefore, attempt on part of the compainant by approaching AML by attending Steering Committee's meetings cannot give the dispute an exclusive colour of a dispute of civil nature nor can it afford a protection to the petitioners against criminal action.

31.2 Considering the rival side contentions, as already discussion earlier, delay in lodging of complaing would be only a relevant consideration at the time of final verdict. Action on part of the complainant in approaching AML and pressing for its dues and filing of a suit in London Court can at the most be considered as a pursuit of civil remedy more so when offence is made out in the complaint prima facie. That cannot destroy the right of the complainant of resorting to a criminal remedy nor can it be a ground for quashing of complaint on the ground of abuse of process of Court.

32. It was contended on behalf of the petitioners that action in form of sale and lease back was only a commercial transaction. It was a bona fide attempt on part of the petitioners to reduce interest burden on AML and to increase cash flow to meet with the requirement of AML. The transaction was entered into after obtaining legal opinion and that the sale and lease back was a transaction permissible under clause 13.1(l) of the Facility Agreement and, therefore, there is no criminality. Having regard to the contention as to bona fide action on part of the petitioners, it was argued that the sale and lease back transactions were entered into after obtaining legal opinion and that clause 13.1(l) of the Facility Agreement permits the sale of the property. Its is a bona fide action and even if it is in violation of the Facility Agreement, it is a bona fide breach of contract and, therefore, the complaint may be quashed.

32.1 In reply, it is contended by the respondents that "bona fide action" is only a defence and defence cannot be considered at this stage by the Court and complaint cannot be quashed on that basis. It is contended that clause 13.1(l) of the Facility Agreement does permit sale

of the property. If at all it permits, it permits sale subject to certain conditions, namely, that the sale will not be at a price lesser than the market value and that the sale is in ordinary course of business. It is asserted by the petitioners that the sale is in ordinary course of business and that it is not for a price lesser than the market price. This is a question of fact and cannot be decided by this Court in a quashing petition. It is contended that the complaint cannot be quashed osn this ground.

32.2 This Court while considering the question of quashing a complaint would not be justified in entering into these questions of fact particularly when a civil litigation has already been instituted and is pending. The question is what assets would be covered by clause 13.1(l) of the Facility Agreement. Whether the property is sold at a full market consideration and whether the property is sold in ordinary course of business are questions of fact. What could be the market price of the property transacted by the sale and lease back agreement would be a question of fact which would require evidence to be led. The contention that the property was new and depreciation was not deducted from book value of the property and the book value of the property would include besides its basic price, the cost of installation, etc. which would make the book value higher than the market value cannot be accepted as it would be only a hypothetical conclusion.

32.3 Likewise, both the sides vehemently argued on question whether it can be said to be a transaction in ordinary course of business. It was argued on behalf of the petitioners that it was entered into with a view to save a project and saving a project would be a transaction in ordinary course of business. At this stage, the Court does not have material to know what crisis the company was facing, what promted AML and ICICI to enter into the transaction of sale and lease back and what were the actual consequences of the transaction and what were the monetary implication of the tranaction and why it was imperative to enter into this transaction are the questions which would call for some evidence and, at this stage, this Court cannot quash the complaint on basis of such contentions and some data produced before this Court without being subjected to scrutiny by the other side and heavily controverted by the other side. The contention regarding bona fides, therefore, is a defence which cannot be looked into by this Court at this stage.

32.4 It is not possible to accept the contention that it is want of an ingredient of the offence and not a defence for the reason that, as discussed above, the complainant has, prima facie, been able to indicate that the property covered under the unattested Memorandum of Hypothecation has been sold by AML and purchased by ICICI despite both of them being party to the Facility Agreement and SAT Agreement and by virtue of which at least beneficial interest in the property in question has passed over from AML to ICICI. It is also not disputed that the sale proceeds of the property are not remitted either to the Lenders or to the Facility Agent. The ingredients are, therefore, cannot be said to have been not made out, prima facie.

33. It was also contended that there is no loss caused to the complainant as the minimum standard of asset cover required under the contract to the extent of 133.33% has been maintained. This again is a question of fact. Whether it is really maintained or not would be a question that can be decided only after evidence is led in this regard and, therefoere, cannot be a ground for quashing the complaint.

34. Contentions regarding whether it was a fixed charge or a floating charge or a mortgage of the property in question and what was the effect of the sale part of the sale and lease back transaction were raised. Fine points on question of rights of mortgager and mortgagee were made out. It was contended that what was sold by sale and lease back transaction was only a right to redeem the mortgage. It was also contended that assuming that the sale and lease back transaction affected the property in question, the transaction has been entered into by ICICI with knowledge about the Facility/SAT Agreements and the Memorandum of Hypothecation and, therefore, ICICI has purchased the property subject to those rights and, therefore, no loss is caused to the complainant and, therefore, the complaint deserves to be quashed. It may be noted that these are fine questions relating to the civil rights which can be decided by a civil court, who is seized of the matter. It is beyond the scope of this petition and these contentions are nothing but a defence raised by the accused and, therefore also, it is not permissible for this Court to go into them. Apart from this, this would call for interpretation of various documents and weighing of material in light of rival side claims, which is not possible for this Court to do, as already discussed earlier. Number of decisions were cited to support these contentions but, as stated above, these questions cannot

be gone into by this Court in such quashing petitions.

35. It was contended on behalf of the petitioners that there is no material to indicate hatching of conspiracy between AML and ICICI. Barring a bald allegation in the complaint, there is nothing to indicate existence of such conspiracy. In this regard, it would be pertinent to note that in most of the cases, it is only from the available circumstances that an inference of conspiracy is to be drawn after the evidence is led. In facts of the present case, considering the material prima facie and considering the transactions of sale and lease back complainted of in light of the earlier transactions in form of Facility Agreement, SAT Agreement and Memorandum of Hypothecation, the contention regarding want of material to indicate conspiracy cannot be accepted for quashing the complaint.

36. It was also contended that case against each of the accused and role of each of the accused is not indicated in the complaint. A plain reading of the complaint, particularly paragraphs 15.1, 15.2, 16, 17.1, 17.2, 17.3, 18, 19 and 20 clearly implicates the ICICI and its officers, whereas paragraphs No.22, 23, 24 and 25 of the complaint implicate AML and its officers. It is clearly alleged that accused No.1 to 9 entered into criminal conspiracy to commit the offence of criminal breach of trust. It is alleged that the accused persons despite being aware about the Facility Agreement and SAT Agreement and creation of trust, after entering into criminal conspiracy, executed Sale and Lease Back Agreement in respect of assets mortgaged/hypothecated. It is also alleged that the transaction could not have taken place without involvement of accused No.1, he being the Managing Director and Chief Executive Officer of ICICI. Likewise, specific allegations are levelled against accused No.4 also, who is Executive Director of ICICI, in paragraph 18. Paragraph 19 makes specific allegations against accused No.5. Paragraph No.20 makes specific allegations against accused No.6.

36.1 Likewise paragraph 22 deals with accused No.7, 23 deals with accused No.8, 24 deals with accused No.9 and makes specific allegations with details and, therefore, it is difficult to accept that the complaint does not indicate role of individual accused. A number of decisions have been cited in this regard, but they are rendered in facts of each case. In a recent case between State of Karnataka and M. Devendrappa and Another, reported in 2002 AIR SCW 286, the Apex Court observed "High Court being the highest Court of a State should

normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal are of magnitude and cannot be seen in their true perspective without sufficient material. ..... It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises, arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vaxatious or oppressive."

36.2 In that case, the High Court quashed a complaint after considering the material on record and noted that there is no definite evidence to show that some of the accused were directly involved. The Apex Court, after making the above observations, set aside that order. In this view of the matter, at this stage, the complaint cannot be quashed even in case where specific material is not indicated since this is a case of a private complaint wherein only summons is issued after initially considering the material on record and charge is yet to be framed and evidence is yet to be led. Therefore, this contention also cannot be accepted.

37. What emerges from the above discussion is that (1) the complaint and the documents annexed thereto, taken as it is, cannot be said to be not making out the offences alleged in the complaint against the petitioners; (2) the defect in authorisation for lodging the complaint, if any, cannot be a ground for quashing the complaint; (3) the impugned order, though non-speaking, cannot be said to be bad and cannot be quashed [Kanti Bhadra Shah v. State of West Bengal (supra)] and U.P. Pollution Control Board v. Mohan Meakins Ltd. (supra)]; and (4) the contention that it is a civil dispute, that the complaint is mala fide, that action of the petitioners was bona fide and taken in ordinary course of business to save a project which was permissible under the contract are all questions of fact and are, in substance, defences raised by the petitioners/accused. Decisions cited in support of such contention are on facts of each case and are not

applicable to the present case.

38. The petitions, therefore, must fail for want of merit. Special Criminal Applications No.433 of 2001, 560 of 2001 and 579 of 2001 are dismissed. Rule issued in these petitions is discharged. Interim relief granted in Special Criminal Application No.433 of 2001 and continued up-till-now stands vacated. No orders are required to be passed in Criminal Misc. Application No.8391 of 2001 and it stands disposed of in view of the fact that the main matter is dismissed.

39. It needs hardly to be stated that observations made in this order are for the limited purpose of deciding the question whether the complaint and the order impugned herein needed quashment. It will have no effect on merit of the complaint case of either side in the proceedings before the learned Trial Magistrate.

[ A.L. DAVE, J. ]

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Order After pronouncement of judgment

40. After the judgment was pronounced, learned Senior Advocates Mr. S.B. Vakil, Mr. M.J. Thakore and Mr. Soparkar request for continuance of the interim relief which was granted by this Court earlier and was continued till pronouncement of the judgment, as the petitioners propose to approach the Apex Court.

41. Heard learned counsel for parties. Learned Senior Advocate, Mr. Nanavati, has strong objection to grant of this relief on the ground that since the petitions are dismissed, the criminal complaint must proceed.

42. In view of the fact that a large number of contentions have been raised by both the sides and in view of the fact that interim relief was granted and continued up-till-now, the ends of justice require that the interim relief granted up-till-now is continued for some time to enable the petitioners to approach the Apex Court.

43. This Court is informed that the Apex Court reopens after vacation on the 8th July, 2002. The request made by the petitioners is to continue the interim relief upto the 31st July, 2001. Considering the intervening time that would be available to the petitioners, the ends of justice would be served, if the interim relief is permitted to continue upto the 22nd

July, 2002 to enable the petitioners to approach the Apex Court. Order accordingly.

07.05.2002 [ A. L. DAVE, J. ]